Supreme Court, U.S.
FILED
JAN 12 1998
CLERK

No. 97-795

In The

Supreme Court of the United States

October Term, 1997

THE PINAL CREEK GROUP, consisting of CYPRUS MIAMI MINING CORPORATION, INSPIRATION CONSOLIDATED COPPER COMPANY, and BHP COPPER INC.,

Petitioners,

v.

NEWMONT MINING CORPORATION, OCCIDENTAL PETROLEUM CORPORATION, CANADIANOXY OFF-SHORE PRODUCTION COMPANY, and ATLANTIC RICHFIELD COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

SHANE R. SWINDLE
KARL M. TILLEMAN
DALTON GOTTO SAMSON & KILGARD, P.L.C.
3101 N. Central Ave.
Suite 900
Phoenix, AZ 85012
(602) 248-0088

MICHAEL J. GALLAGHER
ANDREW M. LOW*
DAVIS, GRAHAM & STUBBS LLP
370 17th St., Suite 4700
Denver, CO 80202
(303) 892-9400

MICHAEL P. BERMAN
KIM E. WILLIAMSON
BROWN & BAIN, P.A.
2901 N. Central Ave.
Phoenix, AZ 85012
(602) 351-8000

*Counsel of Record for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

35 pp

QUESTION PRESENTED

Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA," 42 U.S.C. § 9601, *et seq.*) provides that certain persons (usually referred to as potentially responsible parties, or "PRPs") are liable for response costs incurred in cleaning up hazardous waste disposal sites. Section 107 does not specify whether the liability is joint and several or merely several. A related section of CERCLA, section 113, provides that "any person may seek contribution from any other person who is liable or potentially liable under [section 107(a)], during or following any civil action under [section 106] or under [section 107(a)]." The question presented by this case is:

> Whether the Ninth Circuit correctly joined the five other circuits to have faced the issue in holding that, under CERCLA sections 107 and 113, when a liable party incurs response costs, it may maintain a contribution action against other PRPs to recover an equitable share of those costs, but the liable party cannot maintain an action against other PRPs for joint and several liability.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Court, Respondents state the following:

Newmont Mining Corporation does not have a parent company. Newmont Mining Corporation's non-wholly-owned subsidiary is Newmont Gold Company.

Occidental Petroleum Corporation does not have a parent company. Occidental Petroleum Corporation does not have any non-wholly-owned subsidiaries.

The parent company of CanadianOxy Offshore Production Company is CanadianOxy Holdings, Inc. CanadianOxy Offshore Production Company does not have any non-wholly-owned subsidiaries.

Atlantic Richfield Company ("ARCO") does not have a parent corporation. ARCO holds a controlling equity interest in the following corporate entities: ARCO Chemical Company; Canyon Fuel Co., LLC; Carson Cogeneration Co.; CH-Twenty, Inc.; Logan Aluminum Inc.; and Vastar Resources Inc. ARCO also holds equity interests in each of the corporate entities (many of which are wholly-owned subsidiaries) listed in the Appendix to this Brief in Opposition, beginning at App. 1.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT REQUIRED BY RULE 29.6 ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 3

SUMMARY OF REASONS FOR DENYING THE WRIT 5

REASONS FOR DENYING THE WRIT 6

A. The Question Presented Is An Issue Over Which There Is No Dispute 6

B. The Court of Appeals' Holding That a Liable Party May Not Assert a Joint and Several Claim Against Other PRPs, but Rather Is Limited to a Several Recovery Under Principles of Contribution, Is Consistent With the Decisions of Every Other Court of Appeals that Has Resolved the Issue 7

C. The Decision of the Court of Appeals Is In Accord With CERCLA's Statutory Scheme and Legislative History, The Common Law, This Court's Decision in *Key Tronic*, and Sound Policy 10

1. The Court of Appeals Did Not Reject a Plain Language Interpretation of Section 107(a) ... 10

2. The Court of Appeals' Decision Is Mandated By the Text, Structure and Legislative History of CERCLA, Well-Established Common Law Principles of Joint and Several Liability, and CERCLA's Settlement Provisions 11

TABLE OF CONTENTS – Continued

Page

3. The Court of Appeals' Decision Is Consistent With This Court's Statements in *Key Tronic* ... 15

4. The Court of Appeals Correctly Refused to Base Its Decision on Policy Considerations Which, If Relevant, Provide Additional Support for the Court's Holding 16

D. Certiorari Should Not Be Granted to Address Hypothetical Conflicts That Are Not Presented by This Record, Such As Purported Conflicts Involving Statutes of Limitations or the Nature of the Claims Available to Settling Parties 19

E. The Court Should Not Grant This Petition Because the Judgment Before the Court Is Interlocutory, and This Case Is Not Ripe for Certiorari Review 21

CONCLUSION 23

APPENDIX

1 – Addendum to Statement Required by Rule 29.6 .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761 (CA7 1994) 1, 8

American Const. Co. v. Jacksonville, T. & K.W. Ry. Co., 148 U.S. 372 (1893) 22

Arizona ex rel. Russell F. Rhoades v. Cyprus Miami Mining Corp., No. CIV97-1789 PHX SMM (D. Ariz. filed Aug. 22, 1997) 18

Block v. North Dakota, 461 U.S. 273 (1983) 15

Colorado v. Asarco, Inc., 608 F. Supp. 1484 (D. Colo. 1985) 14

Great Am. Fed. Savings & Loan Ass'n v. Novotny, 442 U.S. 366 (1979) 14

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 22

In re Dant & Russell, Inc., 951 F.2d 246 (CA9 1991) ..4, 17

Key Tronic Corp. v. United States, 511 U.S. 809 (1994) 10, 15, 16

McClanahan v. Morauer & Hartzell, Inc., 404 U.S. 16 (1971) 21

New Castle County v. Halliburton NUS Corp., 111 F.3d 1116 (CA3 1997) 1, 8, 11

Ninth Ave. Remedial Group v. Allis Chalmers Corp., 974 F. Supp. 684 (N.D. Ind. 1997) 10

Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIC, 451 U.S. 77 (1981) 13

TABLE OF AUTHORITIES – Continued

Page

Preiser v. Rodriguez, 411 U.S. 475 (1973) 14

Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (CA11 1996) 1, 8

Rumpke of Indiana, Inc. v. Cummins Engine Co., 107 F.3d 1235 (CA7 1997) 20, 21

Sun Co. v. Browning-Ferris, Inc., 124 F.3d 1187 (CA10 1997), *petition for cert. filed*, 66 U.S.L.W. 1120 (U.S. Dec. 12, 1997) (No. 97-995) 10

Town of New Windsor v. Tesa Tuck, Inc., 919 F. Supp. 662 (S.D.N.Y. 1996) 15

Town of Oyster Bay v. Occidental Chem. Corp., ___ F. Supp. ___, No. 94-CV-0694 (FB), 1997 WL 760189 (E.D.N.Y. Dec. 5, 1997) 9

United States v. Alcan Aluminum Corp., 964 F.2d 252 (CA3 1992) 12

United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983) 12

United States v. Colorado & E.R.R. Co., 50 F.3d 1530 (CA10 1995) 1, 8

United States v. Monsanto Co., 858 F.2d 160 (CA4 1988), *cert. denied*, 490 U.S. 1106 (1989) 12

United States v. R.W. Meyer, Inc., 889 F.2d 1497 (CA6 1989), *cert. denied*, 494 U.S. 1057 (1990) 12

United Tech. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96 (CA1 1994), *cert. denied*, 513 U.S. 1183 (1995) 1, 7, 8, 15

TABLE OF AUTHORITIES – Continued

Page

Virginia Military Inst. v. United States, 508 U.S. 946 (1993) 22

Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27 (E.D. Mo. 1985) 14

STATUTES

42 U.S.C. § 9601, *et seq.* (1994) i

42 U.S.C. § 9613(f)(1) (1994) 14

42 U.S.C. § 9613(g)(2) (1994) 19

42 U.S.C. § 9613(g)(3) (1994) 19

COURT RULES

S. Ct. Rule 15.1 21

S. Ct. Rule 29.6 ii

LEGISLATIVE HISTORY

126 Cong. Rec. S14964 (Dec. 3, 1980) 12

H.R. Rep. No. 99-253(I) at 74, *reprinted in* 1986 U.S.C.C.A.N. 2835 12

OTHER AUTHORITIES

Ann Alexander, *Standing Under Superfund §§ 107 and 113: Avoiding the Error of the Blind Man and the Elephant*, 10 Toxics L. Rep. (BNA) 155 (July 12, 1995) 9

TABLE OF AUTHORITIES – Continued

Page

Jose R. Allen & Karen L. Peterson, *Private Party Litigation Under Superfund: Claims for Cost Recovery and Contribution*, SB91 ALI-ABA 663 (Am. Law. Inst.-ABA June 23, 1997) 9

R. Steven DeGeorge, *Seventh Circuit Decisions Further Confuse the Availability and Significance of CERCLA § 107 Standing*, 9 Envtl. Litig. Comm. Newsl. (ABA Sec. Litig., Chicago, Ill.), No. 1 (1997) 9

Carol E. Dinkins & Lewis C. Sutherland, *Overview: Recent Trends and Developments in Environmental and Toxic Tort Litigation*, SB73 ALI-ABA 261 (Am. Law Inst.-ABA January 23, 1997) 9

Restatement (Second) of Torts (1965) 13

INTRODUCTION

Three issues fundamentally affect the propriety of and defeat the request for certiorari in this case. *First,* the Ninth Circuit's central holding, that Petitioners, as admittedly liable parties under CERCLA, are limited to seeking contribution from other PRPs for equitable apportionment of response costs, is both correct and consistent with the unanimous conclusion of the five other circuits to have considered this issue.[1] The Ninth Circuit properly rejected Petitioners' attempt to impose on Respondents joint and several liability.

Second, the Court of Appeals actually decided in Petitioners' favor the specific question that they have presented for review. Petitioners claim that "the court of appeals concluded that potentially liable parties may not bring private cost recovery claims under CERCLA Section 107(a)." Pet. 6. In fact, the Ninth Circuit held precisely to the contrary:

> Under the literal language of § 107, the Pinal Group, as a PRP, is partly responsible for its cleanup costs and, as "any other person" under § 107, can also hold other PRPs liable for a portion of those same costs.

---

[1] The circuits are the First, Third, Seventh, Tenth, and Eleventh. *See United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96 (CA1 1994), *cert. denied*, 513 U.S. 1183 (1995); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (CA3 1997); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (CA7 1994); *United States v. Colorado & E.R.R. Co.*, 50 F.3d 1530 (CA10 1995); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (CA11 1996).

App. to Pet. for Cert. 7. Thus, as a technical matter, Petitioners have not suffered an adverse ruling on the question they ask this Court to review.

Third, this is an interlocutory appeal, and claims now pending in the case may be resolved in a manner that will make any opinion rendered by this Court purely advisory. Importantly in that regard, Petitioners recently have entered into a settlement agreement with the State of Arizona that, if approved, will remove this case from the purview of the CERCLA sections raised in the Petition. Judicial approval of the settlement would cause this case to be governed by section 113(f)(3), a statutory section addressed neither in the decision below nor in the Petition. For this reason, and others, this interlocutory appeal is not ripe for certiorari review.

In addition to these three fundamental points, it bears noting that The Environment and Natural Resources Division of the United States Department of Justice filed a brief as *amicus curiae* on behalf of the United States in the Ninth Circuit. In its brief and at oral argument, the United States opposed Petitioners' assertion that admittedly liable parties like Petitioners may bring a claim alleging joint and several liability against other PRPs. The United States argued that, "it is clear from all circuit courts that have faced the issue, including the Ninth Circuit, that whatever label is applied, plaintiffs, who have admitted liability, are entitled only to contribution. . . . " U.S. Dept. of Justice Br. 12. The United States also argued that CERCLA sections 107(a) and 113(f)(1) together provide a PRP with a contribution remedy:

> The United States does not believe that CERCLA §§ 107(a) and 113(f) provide separate and distinct causes of action, and that a claim for contribution is based exclusively upon § 113(f). Rather, actions that sound in contribution must be brought pursuant to CERCLA § 107(a) as governed by CERCLA § 113(f). Accordingly, that an action arises under § 107 does not automatically indicate that it is something other than an action in contribution.

Id. at 22. The Ninth Circuit adopted precisely this analysis. App. to Pet. for Cert. 8-9.

STATEMENT OF THE CASE

This case arises out of groundwater pollution in the Pinal Creek Drainage Basin (the "Site"), which is located in Gila County, Arizona. Petitioners (the "Pinal Group") are three mining companies – Cyprus Miami Mining Corporation, Inspiration Consolidated Copper Company, and BHP Copper Company (f/k/a Magma Copper Company) – that have banded together for purposes of this litigation. Cyprus and BHP currently mine and process minerals at various facilities within the Site, and have been operating there continuously for more than a decade. Inspiration, Cyprus's immediate predecessor, owned and operated facilities within the Site for more than seventy years. Petitioners have admitted that they are liable under CERCLA, as the Ninth Circuit so found. App. to Pet. for Cert. 14 n.5.

In the 1980s, the Arizona Department of Environmental Quality ("ADEQ") began investigating groundwater

contamination at the Site and the practices of the current operators. On May 8, 1989, ADEQ declared the Pinal Creek Basin a state WQARF (Arizona's analog to CERCLA) site and executed a Decision of Record authorizing use of money from WQARF to investigate and clean up the Site. Petitioners allege that they incurred response costs for conducting investigations of the groundwater and certain interim response measures.

In 1991 – after ADEQ declared the Site a state WQARF site – Petitioners brought this action against Respondents asserting not only a claim for contribution but also a claim for recovery of all alleged response costs on a theory of joint and several liability. Respondents are companies that either at one time owned mines at the Site or are alleged to have some relationship with former owners that purportedly makes them responsible for the former owners' activities at the Site. On September 18, 1995, ARCO, which was later joined by the other Respondents, moved to dismiss Petitioners' claim for joint and several recovery on the ground that a polluter who is admittedly liable under CERCLA may bring only a contribution claim to recover from another PRP its equitable, several share of the entire liability. The district court denied Respondents' motions.

On interlocutory appeal, the Ninth Circuit reversed the district court, ruling that admittedly liable parties such as Petitioners are limited under CERCLA to a contribution action for several-only liability. The court noted that its holding was consistent with its own precedent in *In re Dant & Russell, Inc.*, 951 F.2d 246 (CA9 1991), App. to Pet. for Cert. 10, and "with statements by the Supreme Court, and by five other circuits. . . . " *Id.* at 13 (citations

omitted). Despite the unanimity among the circuits on this issue, Petitioners seek to have this Court grant certiorari to review the Ninth Circuit's ruling.

SUMMARY OF REASONS FOR DENYING THE WRIT

Certiorari should be denied because the circuit courts have unanimously held that an admittedly liable party can maintain a claim against other PRPs for contribution only. A liable party has no claim against other PRPs to recover, jointly and severally, 100 percent of its costs. This is the only issue resolved by the Ninth Circuit in its well-reasoned opinion and it is the only issue referred to in the Petition which Petitioners have standing to raise. Other issues on which Petitioners assert the circuits conflict, such as the statute of limitations, are not presented in this case.

Certiorari also should be denied because the unanimous view of the circuit courts is correct. As the Ninth Circuit noted, a contrary approach permitting Petitioners to assert joint and several liability against PRPs is not supported by CERCLA's text, is inconsistent with this Court's decision in *Key Tronic* and the traditional doctrine of contribution, entails a significant risk of producing unfair results, and runs the risk of creating procedural chaos.

Moreover, the order that Petitioners present for review is interlocutory, and there is no factual record beyond the basic pleadings. It is highly uncertain whether the issue presented for review will have any

impact on the ultimate outcome of this case, because that outcome depends on the resolution of a number of liability and indemnity issues that have yet to be tried. For these reasons, as well as the proposed settlement, the Court should not grant certiorari at such an early stage of this case.

REASONS FOR DENYING THE WRIT

A. The Question Presented Is An Issue Over Which There Is No Dispute.

Contrary to Petitioners' representations, the issue presented to and decided by the Court of Appeals was *not* whether Petitioners' claim arose under section 107 or under section 113. Instead, the issue was whether, as admittedly liable parties, Petitioners could maintain an action against Respondents for joint and several liability, thereby seeking to shift to Respondents the totality of Petitioners' response costs. In rejecting Petitioners' attempt to do so, the Ninth Circuit correctly found that the question presented by Petitioners is not the true issue:

> We also note that [Petitioners'] argument is based on *the incorrect premise* that a contribution action is not brought under § 107. Thus, *the choice presented by this premise*, between a contribution action created and governed exclusively by § 113, on the one hand, and an independent "cost recovery" action available to working PRPs exclusively under section 107, on the other, *is a false one*.

App. to Pet. for Cert. 18 n.7 (emphasis added). Thus, the Petitioners suffered no adverse ruling on the question they present for review.

B. The Court of Appeals' Holding That a Liable Party May Not Assert a Joint and Several Claim Against Other PRPs, but Rather Is Limited to a Several Recovery Under Principles of Contribution, Is Consistent With the Decisions of Every Other Court of Appeals that Has Resolved the Issue.

Petitioners acknowledge that "[a]t first blush, the Ninth Circuit's decision appears merely to fall in line with decisions of the First, Third, Seventh, Tenth and Eleventh Circuits. . . . " Pet. 13-14. Indeed, all of the circuits that have addressed the issue have held that a liable party may sue other PRPs only for contribution. Petitioners nonetheless propose that these decisions are in conflict because of subtle (at best) differences in the language used to describe the rationale for what are identical conclusions as to whether liable parties may recover all of their costs from other PRPs on a theory of joint and several liability. This is a false conflict that provides no basis for a grant of certiorari.[2]

The Ninth Circuit was not concerned with how other circuit courts have addressed what is, in this case, a purely academic question of whether a liable party's claim against other PRPs arises exclusively under section

---

[2] The Court declined to review this precise question two years ago. *See United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). There is no reason to treat this petition differently.

107(a) or section 113(f). This is the issue incorrectly presented for review by Petitioners and concerning which Petitioners assert that the circuit courts differ. The Ninth Circuit did, however, review the decisions of the remaining circuits on the issue presented by this case – whether a liable PRP could assert a joint and several claim for the totality of its response costs. On this issue, the Ninth Circuit found unanimity among the circuit courts:

> Our holding today is consistent with statements by the Supreme Court, and by five other circuits, recognizing in contexts similar to this one, that a CERCLA claim by a PRP against another PRP is necessarily for contribution.

App. to Pet. for Cert. 13; *accord New Castle County*, 111 F.3d at 1124 ("Where both parties are 'non-innocent' responsible persons . . . any action to reapportion costs between the parties is an action for contribution."); *Redwing Carriers*, 94 F.3d at 1496 ("Redwing is a responsible party under CERCLA, and therefore, its claims against other allegedly responsible parties are claims for contribution."); *Colorado & E.R.R. Co.*, 50 F.3d at 1536 ("[B]oth parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution."); *United Tech. Corp.*, 33 F.3d at 100 ("By contrast, 42 U.S.C. § 9613(g)(3) allows a 'non-innocent' party (*i.e.*, a party who himself is liable) only to seek . . . contribution rather than complete indemnity."); *Akzo Coatings*, 30 F.3d at 764 (stating that an action brought by "a party liable in some measure for the contamination . . . is a quintessential claim for contribution."). Petitioners do not and cannot demonstrate a

conflict among the circuit courts on this fundamental issue.[3]

Indeed, the courts that have addressed this issue since the Ninth Circuit's decision have confirmed this unanimity of circuit court authority. *E.g., Town of Oyster Bay v. Occidental Chem. Corp.*, ___ F. Supp. ___, No. 94-CV-0694 (FB), 1997 WL 760189 at *25 (E.D.N.Y. Dec. 5, 1997) ("All of the circuit courts to have considered this issue have determined . . . that a potentially responsible person . . . cannot seek joint and several liability against

---

[3] Petitioners cite a number of law journal articles in support of their assertion that opinions of lower federal courts on the issue raised in the Petition are "widely divergent." Pet. 8-9 & n.6. However, all of these articles acknowledge that the split of authority on this issue exists only at the *district court* level. *E.g.*, Ann Alexander, *Standing Under Superfund §§ 107 and 113: Avoiding the Error of the Blind Man and the Elephant*, 10 Toxics L. Rep. (BNA) 155, 159 (July 12, 1995); R. Steven DeGeorge, *Seventh Circuit Decisions Further Confuse the Availability and Significance of CERCLA § 107 Standing*, 9 Envtl. Litig. Comm. Newsl. (ABA Sec. Litig., Chicago, Ill.), No. 1, at 1 (1997). Moreover, all but two of the articles cited were published before the Third, Ninth, and Eleventh Circuits joined the consensus established by the First, Seventh, and Tenth Circuits that liable and potentially liable parties are limited to contribution actions for several liability only. Other recent secondary authority addressing this issue recognizes the unanimity among the circuit courts. *See, e.g.*, Jose R. Allen & Karen L. Peterson, *Private Party Litigation Under Superfund: Claims for Cost Recovery and Contribution*, SB91 ALI-ABA 663, 674 (Am. Law. Inst.-ABA June 23, 1997) (recognizing that the lower courts are divided on the issue but a clear consensus has emerged among the circuit courts); Carol E. Dinkins & Lewis C. Sutherland, *Overview: Recent Trends and Developments in Environmental and Toxic Tort Litigation*, SB73 ALI-ABA 261, 275 (Am. Law Inst.-ABA January 23, 1997) (same).

other potentially responsible persons, but may only seek contribution. . . . "); *Ninth Ave. Remedial Group v. Allis Chalmers Corp.*, 974 F. Supp. 684, 689 (N.D. Ind. 1997) ("All other circuits which have considered the issue directly have agreed with the Seventh Circuit[ ]" that an action by a liable party against other PRPs is for contribution only). Thus, there is no split among the circuits on the issue addressed and decided by the Ninth Circuit.

C. The Decision of the Court of Appeals Is In Accord With CERCLA's Statutory Scheme and Legislative History, The Common Law, This Court's Decision in *Key Tronic*, and Sound Policy.

Petitioners assert that the Ninth Circuit incorrectly failed to interpret section 107 according to its "plain language." Pet. 21-27. In fact, on the issue decided by the Ninth Circuit, section 107 is silent. However, the Ninth Circuit's decision is mandated by the text, structure and legislative history of CERCLA, established common law principles, this Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), and sound policy considerations.

1. The Court of Appeals Did Not Reject a Plain Language Interpretation of Section 107(a).

The "plain language" interpretation to which Petitioners refer means interpreting the phrase "any other person" in section 107(a)(4)(B) to authorize a claim by a liable party. Petitioners correctly point out that a number of courts have reached this conclusion. *See, e.g., Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1193-94 (CA10 1997)

("our holding merely recognizes that . . . all actions by and between jointly and severally liable PRPs are 'actions under § 107' for purposes of liability. . . . "), *petition for cert. filed*, 66 U.S.L.W. 1120 (U.S. Dec. 12, 1997) (No. 97-995); *New Castle County*, 111 F.3d at 1122 (noting that section 113 "confirms the right of a [PRP] under section 107 to obtain contribution from other [PRPs].").

Petitioners wrongly imply, however, that the Ninth Circuit rejected this reading of section 107. To the contrary, and as discussed in the Introduction above, the Ninth Circuit concluded that liable parties like Petitioners *do* have a claim arising at least in part under section 107. App. to Pet. for Cert. 8-9.

2. The Court of Appeals' Decision Is Mandated By the Text, Structure and Legislative History of CERCLA, Well-Established Common Law Principles of Joint and Several Liability, and CERCLA's Settlement Provisions.

On the issue fairly presented by this case, which is whether a liable party can recover the entirety of its response costs jointly and severally from other PRPs, section 107 is silent. CERCLA does not describe the nature of the remedy under section 107(a), nor does that section even mention "joint and several liability." The legislative history of this section suggests that Congress knew it had left this issue unresolved and intended the courts to fill the gap by applying common law principles:

> It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any

> reference to these terms has been deleted, and the liability of joint tort feasors will be determined under common or previous statutory law.

126 Cong. Rec. S14964 (Dec. 3, 1980) (Statement of Sen. Randolph, sponsor of the bill). Applying common law principles, the courts have found that a non-liable party, such as the government, may seek joint and several liability against a PRP. *See, e.g., United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268-69 (CA3 1992); *United States v. Monsanto Co.*, 858 F.2d 160, 171 & n.23 (CA4 1988), *cert. denied*, 490 U.S. 1106 (1989).[4]

The essence of Petitioners' argument is that if a *non-liable party* may bring a claim under section 107(a) for joint and several liability, then the nature of a claim by a *liable party* under section 107(a) also must be for joint and several liability. However, Petitioners' reasoning is demonstrably faulty under both the common law and well-established CERCLA decisional law.

At common law, actions between joint tortfeasors sound strictly in contribution. No liability scheme allows

---

[4] The joint and several nature of liability of a wrongdoer under CERCLA section 107(a) was established in *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808-11 (S.D. Ohio 1983). When CERCLA was amended in 1986, the House report specifically referred to and endorsed the *Chem-Dyne* holding: "nothing in this bill is intended to change the application of the uniform federal rule of joint and several liability enunciated by the *Chem-Dyne* court." H.R. Rep. No. 99-253(I) at 74, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856; *see United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 & n.19 (CA6 1989) (noting Congressional approval of *Chem-Dyne*), *cert. denied*, 494 U.S. 1057 (1990).

one joint tortfeasor to shift all the liability to others merely because it has incurred expenses in satisfying a common obligation. These fundamental common law concepts are clearly stated by the *Restatement (Second) of Torts* (1965) ("*Restatement*"). Section 433A of the *Restatement* expresses the general rule that in cases involving multiple tortfeasors, each is responsible for its equitable portion of the harm. Where suit is brought by an admittedly liable party, the very rationale for imposing joint and several liability – to promptly make the innocent victim whole in the face of indivisible harm – disappears. *See Restatement* § 433B, cmt. d ("As between the proved tortfeasor who has clearly caused some harm, and the *entirely innocent* plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.") (emphasis added). To impose joint and several liability in cases among liable parties would turn this doctrine on its head. "[W]hen two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability." *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 88 (1981).

Petitioners do not and cannot assert that their interpretation of CERCLA sections 107 and 113 would be consistent with the common law, and nothing in the text or legislative history of the act suggests that Congress intended to create new joint and several claims among joint tortfeasors. Thus, the Ninth Circuit was simply applying basic common law principles, as Congress

intended, when it held that a liable party suing under section 107(a) is limited to a claim for contribution.

Petitioners' simplistic syllogism – that if a non-liable party's claim under section 107(a) is for joint and several liability, then a claim by liable parties like Petitioners under the same section must be for joint and several liability – also is wrong under well-established decisional law. When CERCLA was first enacted, it contained no express right of contribution among PRPs. Nonetheless, most courts found by applying common law principles that a contribution remedy for several liability was available under section 107. *E.g., Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1492 (D. Colo. 1985).

In 1986, as part of the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986), Congress added section 113(f)(1), which expressly provides for this contribution remedy: "Any person may seek contribution from any other person who is liable or potentially liable. . . . " 42 U.S.C. § 9613(f)(1) (1994). It is axiomatic that when Congress creates an express remedy for a certain class of claims, as it did in section 113, claims that fall squarely within the parameters of that remedy are governed by it.[5] Thus, now that

---

[5] *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973) (holding that *habeas corpus*, and not 42 U.S.C. § 1983, is the appropriate remedy for state prisoners attacking the validity or length of their confinement, and that plaintiffs could not escape that fact "by the simple expedient of putting a different label on their pleadings"); *Great Am. Fed. Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 375-77 (1979) (rejecting plaintiff's attempt

Congress has expressly incorporated a right of contribution into CERCLA, liable parties cannot avoid that remedy by attempting to plead a joint and several claim under section 107(a).

The settlement provisions of CERCLA also provide strong evidence that all six circuits to have addressed the issue are correct in holding that admittedly liable parties are limited to a contribution remedy against other PRPs. CERCLA section 113(f)(2) protects a settling party from "contribution" claims brought by other liable parties. This protection would be hollow indeed if liable parties could sidestep the statute by asserting claims against settling parties for joint and several recovery instead of contribution. *See United Tech. Corp.*, 33 F.3d at 103; *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 681 (S.D.N.Y. 1996).

3. The Court of Appeals' Decision Is Consistent With This Court's Statements in *Key Tronic*.

As the Ninth Circuit recognized, its holding comports with this Court's decision in *Key Tronic*. App. to Pet. for Cert. 8. There, this Court stated that a contribution remedy is indeed part of section 107(a) and that this

---

to assert rights created by Title VII within the remedial framework of 42 U.S.C. § 1985(3): "If a violation of Title VII could be asserted through section 1985(3), a complainant could avoid most if not all of the . . . detailed and specific provisions of [Title VII]"); *Block v. North Dakota*, 461 U.S. 273, 285 (1983) (regardless of against whom an action is asserted or how it is described, any action challenging the United States' title to real property falls under the Quiet Title Act).

remedy overlaps with the contribution remedy now expressly provided in section 113:

> The 1986 SARA amendments included a provision – CERCLA § 113(f) – that expressly created a cause of action for contribution. *See* 42 U.S.C. § 9613(f). Other SARA provisions, moreover, appeared to endorse the judicial decisions recognizing a cause of action [for contribution] under § 107 by presupposing that such an action existed. . . . Thus the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.

511 U.S. at 816. *Key Tronic* confirms that suits under section 107(a) may be for several liability. *See, e.g., id.* at 809, 814-15 & 816 n.7. Thus, *Key Tronic* demonstrates that Petitioners are wrong in assuming that any claim brought under section 107 necessarily must be for joint and several liability.

4. The Court of Appeals Correctly Refused to Base Its Decision on Policy Considerations Which, If Relevant, Provide Additional Support for the Court's Holding.

The interpretation of CERCLA that Petitioners urge also would be contrary to sound public policy. Both in the district court and before the Ninth Circuit, Petitioners' principal argument was based on policy: it maintained that permitting a liable party to maintain an action for joint and several recovery would encourage early cleanups by allowing liable parties that incur costs – no

matter how responsible they may be for the contamination of a site – to shift those costs to other PRPs. The district court adopted this argument in substantial part. App. to Pet. for Cert. 38-42. On appeal, however, the United States appeared as *amicus curiae* and opposed this result-oriented approach to the construction of section 107. *See* U.S. Dept. of Justice Br. 42 ("Indeed, giving private parties the strong litigation weapon of joint and several liability is not necessary to encourage 'voluntary' cleanups."). The Ninth Circuit properly rejected this method of statutory construction as well:

> [Petitioners] contend[ ] that our holding would hamper CERCLA's policy of promoting rapid and voluntary environmental responses by private parties to the threat posed by hazardous waste sites. We reject this argument because it is based on policy considerations which we cannot consider in light of the controlling text, structure, and logic of CERCLA and of our own precedent in *Dant & Russell*.
>
> In any event, we are not convinced that the policy of promoting rapid voluntary cleanups would be undermined to any significant degree by our holding. As discussed above, courts may take into account the degree of cooperation shown by a PRP when equitably allocating liability among PRPs under § 113(f)(1).

App. to Pet. for Cert. 16.

Petitioners include the current operators of mines within the Site which have admitted their liability for cleanup costs under section 107(a) of CERCLA. App. to Pet. for Cert. 19 n.8. Respondents, on the other hand, are claimed to be liable only for activities which occurred at

least a decade ago and have denied any responsibility for contamination at the Site. Thus, the ongoing operators of the Site seek to impose joint and several liability on companies that have no current connection to the Site.

Petitioners contend that imposing joint and several liability on Respondents would be merely a first step, and that Respondents would have a right to assert counterclaims for contribution to reapportion some of the liability to Petitioners. Pet. 12. However, as the Ninth Circuit noted, any scheme that would permit Petitioners to bring a joint and several claim, subject to the Respondents' contribution claims, would be extremely inefficient and "could result 'in a chain reaction of multiple, and unnecessary lawsuits.' Such a joint and several approach would 'guarantee[ ] inefficiency, potential duplication, and prolongation of the litigation process in a CERCLA case.' " App. to Pet. for Cert. 13 (alteration in original) (citations omitted).

Moreover, this argument is disingenuous. Petitioners have reached a settlement with the State of Arizona and have filed a proposed consent decree. *Arizona ex rel. Russell F. Rhoades v. Cyprus Miami Mining Corp.*, No. CIV97-1789 PHX SMM (D. Ariz. filed Aug. 22, 1997). That consent decree, if approved, would purport to confer on Petitioners complete immunity from any contribution claims under CERCLA by Respondents. If Respondents are found liable, Petitioners could use their proposed statutory interpretation to attempt to impose on Respondents 100 percent of cleanup costs at the Site. There is no indication that Congress intended such a patently unjust result in this or any other case.

D. Certiorari Should Not Be Granted to Address Hypothetical Conflicts That Are Not Presented by This Record, Such As Purported Conflicts Involving Statutes of Limitations or the Nature of the Claims Available to Settling Parties.

Petitioners concede that each of the six courts of appeals that has considered the matter has agreed that a liable party may sue other PRPs only for contribution. Pet. 13-14. They argue, however, that differences in the reasoning employed by these courts – *i.e.*, whether the cause of action for contribution arises exclusively under section 107(a), exclusively under section 113(f), or under both – entails a conflict warranting this Court's review. Pet. 14-20. In the style of a law review article, Petitioners chronicle a variety of conflicts that might arise in the future between the Ninth Circuit and other courts of appeals. Certiorari should be denied here because there is no conflict on any issue actually presented by the holding in this case.

First, Petitioners suggest (Pet. 15-17) that the circuit courts have reached differing conclusions concerning the statute of limitations governing a claim by one PRP against another, depending on whether that claim is held to arise under section 113 or section 107.[6] Because no

---

[6] The three-year statute of limitations set forth in CERCLA section 113(g)(3), 42 U.S.C. § 9613(g)(3), applies to an "action for contribution for any response costs[.]" The six-year statute of limitations set forth in CERCLA section 113(g)(2), 42 U.S.C. § 9613(g)(2), applies to an "initial action for recovery of the costs referred to in [section 107.]" (Text of statutes reprinted at App. to Pet. for Cert. 72-73.) Both statutory sections provide a variety of different events that can trigger the running of the statutory periods.

statute of limitations issue was raised in this case, the Ninth Circuit properly refused Petitioners' request to consider and decide this issue:

> No statute of limitations issue is before us in this case and we decline the Pinal Group's invitation to opine on it indirectly. . . . The court directly faced with the issue must determine whether § 113(g)(3), § 113(g)(2), or some other statute should apply.

App. to Pet. for Cert. 17. This Court should decline certiorari for the same reason.

Similarly, Petitioners suggest that certiorari should be granted to determine whether a liable party that settles with the government and receives "contribution protection" under section 113(f)(2) nonetheless could be subject to a claim by another PRP under section 107(a). Pet. at 17. Although it is theoretically possible, in light of the recently-lodged consent decree, that this issue might subsequently arise in this case, it was not an issue presented to the district court or the Ninth Circuit.

Petitioners next argue that the Seventh Circuit's decision in *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235 (CA7 1997), raises a conflict with other circuits by suggesting that a "blameless" landowner might be able to pursue a claim against other PRPs for joint and several liability. Pet. 18-20. However, "the Pinal Group acknowledges explicitly that it is partly responsible for the cleanup costs incurred by it." App. to Pet. for Cert. 19 n.8. Thus, Petitioners are not blameless, and any conflict that they claim exists has no relevance here. The Ninth Circuit specifically declined to review this issue, and it is not properly presented for review by this Court. App. to

Pet. for Cert. 14 n.5 ("Because the Pinal Group consists of parties who are admittedly partly responsible for the contamination at issue here, [the *Rumpke*] exception would not apply to this case. We, therefore, do not reach that issue.").

Finally, Petitioners suggest that there is doubt concerning whether a liable party may obtain declaratory relief or prejudgment interest under section 107. Pet. 17-18. These issues were not addressed either by the district court or by the Ninth Circuit.

Because these issues are not presented by this case and were not decided by the courts below, none of these issues "properly would be before the Court if certiorari were granted." S. Ct. Rule 15.1; *see McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16, 16 (1971) (dismissing writ as improvidently granted where "[f]uller examination of the case on oral argument discloses that the record does not adequately present" the question on which certiorari was granted).

E. The Court Should Not Grant This Petition Because the Judgment Before the Court Is Interlocutory, and This Case Is Not Ripe for Certiorari Review.

This case is still far from trial, and the decision below was based solely on the pleadings. As the case develops, claims now pending in the case may be resolved in a manner that will render any decision rendered by the Court purely advisory. First, the Respondents may not be found liable under CERCLA. Second, some or all of the liability which Petitioners seek to shift to the Respondents ultimately may fall back upon Petitioners under the

Respondents' contractual indemnity claims. Third, if the proposed consent decree is approved, Petitioners' claims will be governed by an entirely different section of CERCLA, section 113(f)(3) (which defines the rights of a settling party), rather than CERCLA sections 107(a) and 113(f)(1), which Petitioners request the Court to construe. As a result, this case no longer would be governed by the statutory sections discussed in the Petition.

The possible resolution of this case on grounds other than those presented to the Ninth Circuit demonstrates precisely why, on several occasions, this Court has stated its reluctance to grant certiorari to review cases that are in an interlocutory posture. *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); *American Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) (observing that certiorari to review an interlocutory order will be denied "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."). Petitioners' reliance on issues that are, on the present state of the record, wholly hypothetical, further demonstrates that this case is not ripe for certiorari review.

CONCLUSION

For these reasons, Respondents request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

MICHAEL J. GALLAGHER
ANDREW M. LOW*
DAVIS, GRAHAM & STUBBS LLP
370 17th St., Suite 4700
Denver, CO 80202
Telephone: (303) 892-9400

SHANE R. SWINDLE
KARL M. TILLEMAN
DALTON GOTTO SAMSON & KILGARD, P.L.C.
3101 N. Central Ave., Suite 900
Phoenix, AZ 85012
Telephone: (602) 248-0088

MICHAEL P. BERMAN
KIM E. WILLIAMSON
BROWN & BAIN, P.A.
2901 N. Central Ave.
Phoenix, AZ 85012
Telephone: (602) 351-8000

**Counsel of Record*
Attorneys for Respondents

January 12, 1998

APPENDIX 1

ADDENDUM TO STATEMENT REQUIRED BY RULE 29.6

Corporate Entities In Which Respondent Atlantic Richfield Company Holds Equity Interests

Agro Internacional, S. de R.L. de C.V.
Alpine Pipelines Company
Alyeska Pipeline Service Company
AM/PM Japan Ltd.
ARCO Solar Nigeria, Ltd.

Badger Lake Pipe Line Company
Black Lake Pipeline Company
Blair Athol Joint Venture
Border Pipe Line Company

Candelaris Exploration Corporation
Casitas Pipeline Company
Chartwin Enterprises Limited
China Coal Bed Methane Ltd.
Clermont Joint Venture
Coal Resources of Queensland Pty. Ltd.
Compania de Petrolea Ganso Azul, Ltda
Compania Mexicana de Petroleo El Charro S.A.
Compania Petrolera Carco
Cook Inlet Pipe Line Company
Curragh Coal Sales Co., Pty. Ltd.
Curragh Queensland Mining, Limited
Cuyama Pipeline Company

Delta Housing Inc.
Dixie Pipeline Company
Dos Pueblos Golf Links I-V, Ltd.

East Texas Salt Water Disposal Company
El-Biar Real Estate Holdings, Inc.
EnArco Resin S.p.A.
Eurogen C.V.

F & H Pipeline Company
Gordonstone Coal Management Pty., Ltd.
Gordonstone Coal Sales Pty., Ltd.
Grant Gathering Company
Greater Pacific Limited
Guangzhou Wittenberg Oil Co. Ltd.
Gulfstream Sinclair Joint Venture Co. Limited

HAB Assets, Inc.
Hutzhou Wittenberg Petroleum Supply Co. Ltd.

Inversiones ARCO. S. DE R.L. DE CV.

Jiu Feng ARCO Shipping Company, Ltd.
JSC Oil Company LUKOIL

Kuparuk Pipeline Company
Kuparuk Transportation Company
Kuparuk Transportation Capital Corporation

Little Thunder Leasing Company
Los Angeles Export Terminal, Inc.
Los Patacios Exploration Corporation
LUKARCO B.V.
LUKARCO Finance B.V.
LUKARCO Limited
LUKARCO Services B.V.
LUKOIL

Mountain Coal Company

New Cure, Inc.
Nihon Oxirane Co., Ltd.

Oliktok Pipeline Company
Olympic Pipeline Company
Orinoco Joint Venture
Oxirane Chemical Company

Pan American Petroleum Company of California
PayPoint Electronic Payment Systems, Inc.
Portview International Ltd.

POSM Delaware, Inc.
POSM II Limited Partnership, L.P.
POSM II Properties Partnership, L.P.
Prestige Stations, Inc.
Prince William Sound Oil Spill Response Corporation
Products Cogeneration Company
P.T. ARCO Chemical Indonesia

Rodas Exploration Corporation

Santa Cruz Exploration Corporation
Seaway Pipeline Company
Shine Top International Investment Limited
Silva Exploration Corporation
South Kerkennah Oil Company
Streamelec B.V.

Tertiary Services, Inc.
Texas-New Mexicc Pipe Line Company
The Counsel for Environmentally Sound Deicing, Inc.
The Meadows Corporation
Thunder Basin Coal Company, L.L.C.
Thunder Basin Coal Holdings, Inc.
Tricentrol

Val Verde Pipeline, L.P.
Vastar Gas Marketing, Inc.
Vastar Holdings, Inc.
Vastar Power Marketing, Inc.
Ventway Pty., Ltd.

Wallani Pty., Ltd.
Western Energy Cogen, Inc.
Wilburton Hub, Inc.
Wittenberg (Hong Kong) Ltd.
Wittenberg Investments Ltd.

Zhenhai Refining and Chemical Company